Supreme Court
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No. 00-0513

In The

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AUGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now come Augustina Trevino, Herminia Herrera, Beatriz Olivarez and Gloria Guajardo, Respondents, and submit this their Brief in Opposition to the Petition for Writ of Certiorari filed in this cause by Levi Strauss & Co., Petitioner.

STATEMENT OF THE CASE

A. Factual Background of Plaintiffs

Respondents disagree with the portion of Petitioner's Statement of the Case purporting to describe the "Factual Background of Plaintiffs." The characterizations contained therein are inaccurate. All four Respondents asserted retaliatory discharge causes of action based on having filed workers' compensation claims. Appendix, ¶ 9. Respondents did not mention or invoke the Collective Bargaining Agreement (CBA). Instead, it was *Petitioner* who invoked the provisions of the CBA in defense of its actions. Respondents uniformly asserted "that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act." Appendix, ¶¶ 5-8.

Thus, this Court should not conclude, as Petitioner wishes this Court to conclude, that Ms. Trevino and Ms. Guajardo were "terminated pursuant to the CBA," nor

that Ms. Herrera and Ms. Olivarez were "terminated after [and because] she failed to provide a properly dated doctor's letter," Petitioners' Brief, pp. 5, 6. Instead, the very issue in dispute is whether, as Respondents allege, they were terminated in retaliation for filing workers compensation claims. At the removal/remand stage, however, the Respondents claims should be accepted as true.[1]

B. Brief Overview of Fifth Circuit Decision

Respondents strongly disagree with that portion of Petitioner's Statement of the Case entitled "Brief Overview of Fifth Circuit Decision" and stating "The Fifth Circuit failed to discuss any of the facts set forth above surrounding . . . the CBA provisions that underlie their workers' compensation discrimination claims." Petitioner's Brief, at p. 6. In fact, the Fifth Circuit did examine and discuss the application of the facts as alleged by Respondents, finding "The primary issue in this case is the factual question of motivation: Did the defendant fire the plaintiffs in retaliation for filing workers' compensation claims? The answer to this question is not dependent on an interpretation of the CBA. Plaintiffs have an independent right to file workers' compensation claims without fear of losing their jobs." Thus, in contrast to

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[1] "Thus, with few exceptions, the cause of action upon which the removability of a case will be judged is whatever the plaintiff declares it to be in his or her pleadings and not what the plaintiff could have alleged, unless there is fraud or collusion," which neither exist nor were alleged by Petitioner. 29A Federal Procedure, L.Ed. § 69:61 (1998).

Petitioner's assertion that the Court ignored the facts surrounding the CBA, the fact is that the Fifth Circuit considered the CBA but found it not dispositive on the issue of Petitioner's intent in terminating Respondents, which is the relevant issue in a workers' compensation retaliation claim.

Additionally, the Fifth Circuit did not, as represented by Petitioner, "simply set out a bright line rule that workers' compensation discrimination claims, by their very nature, can never be preempted by § 301 of the LMRA." Petitioner's Brief, at p. 6. Instead, the Fifth Circuit issued a narrowly drawn opinion holding that the specific causes of action asserted in this case did not require interpretation of the CBA, and in fact exist independent of the CBA, so that the LMRA, and any preemption related to same, is inapplicable under the facts and allegations made in this case.

REASONS FOR DENYING THE WRIT

Certiorari should not be granted for several reasons. First, the conflict between the Circuits which is alleged is illusory since the cases cited can be reconciled. Second, Petitioner misreads the Fifth Circuit's opinion, which renders the nature of the legal issues presented by Petitioner for review inaccurate and/or improper. Third, the right result was reached below. Fourth, even if this Court felt that there were a conflict in the circuit opinions, the issue is not ripe for review.

SUMMARY OF ARGUMENT

Petitioner predicates review upon two propositions: (a) that the United States Fifth Circuit Court of Appeals erroneously concluded that a workers' compensation discrimination/retaliation claim arises under the State worker compensation laws and is therefore barred from removal by 28 U.S.C. § 1445(c)[2]; and (b) that the Fifth Circuit has established an impermissible per se rule that workers' compensation discrimination claims can never be preempted by § 301 of the Labor Management Relations Act (LMRA). In both regards, Petitioner is incorrect.

First, courts are virtually unanimous in holding that a workers' compensation discrimination/retaliation claim arises under state workers' compensation law within the meaning of § 1445(c), *particularly* where, as here, the basis for such claim was established by statute, and even more particularly where the statute involved, as here, is part of the state's workers' compensation statutory scheme. Any other interpretation, including that posited by Petitioner, would fail to meet Congress' intent in enacting 28 U.S.C. § 1445(c), which includes: [1] stemming the flood of workers' compensation cases being removed to federal court; [2] restricting workers' compensation cases to state court because they involve purely local disputes implicating no federal concerns; [3] giving effect to federal rules of construction and principals of federalism by construing against removability; and [4] recognizing that federal

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[2] 28 U.S.C. § 1445(c) reads as follows: "A civil action in any State court arising under the workmens' compensation laws of such State may not be removed to any district court of the United States."

law determines the removability of an action, unfettered by local law definitions or characterization of the subject matter.

Second, the Fifth Circuit has established neither an *impermissible* rule nor a *per se* rule that workers' compensation discrimination claims can never be preempted by § 301. Instead, the Fifth Circuit held that, under the particular allegations and facts of this case, interpretation of the CBA was not required, and therefore that § 301 was inapplicable. As such, the Fifth Circuit's decision in this case does not conflict with the decision of other federal circuit courts holding that claims of workers' compensation discrimination are preempted by § 301 when they allege a breach of or require interpretation of a CBA; no such breach was alleged, nor is any such interpretation required in order to determine Respondents' claims for relief.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit Correctly Concluded That a Worker's Compensation Discrimination Claim In Texas Arises Under The State Worker Compensation Laws and Is Therefore Barred From Removal By 28 U.S.C. § 1445(c)

A. Case Law Supports the Fifth Circuit's Decision

Courts are virtually unanimous in joining the Fifth Circuit in holding that a workers' compensation discrimination claim arises under state workers' compensation law within the meaning of § 1445(c), particularly where,

as here, the basis for such claim was established by statute, and even more particularly where, as here, the statute involved is part of the state's workers' compensation statutory scheme. *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1118 (5th Cir. 1998). C.f., *Patin v. Allied Signal, Inc.*, 77 F.3d 782, 787 (5th Cir. 1996) (distinguishing and finding removable a claim for breach of the duty of good faith and fair dealing in denying a workers' compensation claim because such claim was created by the common law, not by the state's workers' compensation act).

Thus, workers' compensation retaliation claims have been held not removable by the vast majority of courts to address the issue, including *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995); *Reed v. Heil Co.*, 206 F.3d 1055 (11th Cir. 2000); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351 (10th Cir. 1997); *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301 (N.D. Ala. 1997); *New v. Sports & Recreation, Inc.*, 947 F. Supp. 453 (S.D. Ala. 1996); *Subra v. CMS Therapies, Inc.*, 900 F. Supp. 407 (M.D. Ala. 1995); *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d 744 (N.D. W.Va. 2000). All of these courts also explicitly recognize the distinction between workers compensation retaliation claims arising from a statute, which are not removable, and workers compensation retaliation claims arising under common law, which have been found, under limited circumstances, *potentially* removable in a few states (not including Texas). *Humphrey*, at p. 1245; *Suder*, at p. 1352; *Reed*, at p. 1059; *Subra*, at p. 410; *New*, at p. 457.

B. Statutory Design Supports Fifth Circuit Decision

Discrimination, including retaliation, for filing a workers' compensation claim is prohibited in Texas by Tex. Labor Code § 451.001 (Vernon 1996). This section, along with § 451.002 (Vernon 1996), which delineates the available remedies and burden of proof, and § 451.003 (Vernon 1996), which extends such remedies to include injunctive relief, comprise Subtitle B of the Texas Workers' Compensation Act. Subtitle A is titled "Texas Workers' Compensation Act." Subtitle B is titled "Discrimination Issues." Subtitle C is titled "Workers' Compensation Insurance Coverage for Certain Government Employees." Subtitles A, B and C are contained together in Title 5, titled "Workers' Compensation."

A review of these provisions, including the manner in which they are set out, makes it clear that they are complimentary pieces of a comprehensive plan to provide workers' compensation coverage. Thus, the court in *Jones v. Roadway Express, Inc., supra,* at 1092, acted correctly in treating workers' compensation retaliation claims as within the workers' compensation laws of the State, and thus not removable.

C. Policy Supports the Fifth Circuit's Decision

Any interpretation of retaliatory discharge claims as independent from the workers' compensation laws, including the interpretation posited by Petitioner, fails to meet Congress' intent in enacting 28 U.S.C. § 1445(c). This

intent includes: [1] stemming the flood of workers' compensation act cases being removed to federal court; [2] restricting workers' compensation act cases to state court because they involve purely local disputes implicating no federal concerns; [3] giving effect to federal rules of construction and principles of federalism by construing against removability; and [4] recognizing that federal law determines the removability of an action, unfettered by local law definitions or characterization of the subject matter. *Lackey v. Gateway Homes, Inc.*, 944 F. Supp. 870, 873 (N.D. Ala. 1996); *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301, 1304 (N.D. Ala. 1999), quoting *Roberts v. Beaulieu of America, Inc.*, 950 F. Supp. 1509 (N.D. Ala. 1996); *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d 744, 745 (N.D.W.Va. 2000), quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). In fact, some courts logically recognize and hold that a workers' compensation retaliation claim, whether or not codified as part of its workers compensation chapter, is "essential to the efficacy of [the] statutory worker's compensation scheme," and thus should not be removable. *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301, 1304 (N.D. Ala. 1999), quoting *Roberts v. Beaulieu of America, Inc.*, 950 F. Supp. 1509 (N.D. Ala. 1996). *See also Jones v. Roadway Express, Inc.*, 931 F.2d at 1092; *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d at 748.

D. Petitioner's Authorities Inapposite

The cases cited by Petitioner are not contrary to the holdings cited above. Instead, the authorities cited by

Petitioner involve those few states where workers compensation retaliation claims arise under the common law, not statute, and constitute an independent tort. Such claims are held not to arise under the state's workers' compensation law. *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. den'd*, 513 U.S. 955 (1994) (analyzing Illinois law);[3] *Thornton v. Denny's Inc.*, 992 F.2d 1217 (table), 1993 WL 137078*2 (6th Cir., Apr. 29, 1993) (. . . "[Plaintiff's] claim does not arise under the Michigan workers' compensation law. . . . The workers' compensation statute provides neither the mechanisms nor the remedy for this type of suit.")

Nor should this Court read *Spearman* too broadly. Even cases adopting the spirit of *Spearman* recognize that its holding is inapplicable to a retaliatory discharge claim. *See*, e.g., *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 124-28 (4th Cir. 1995) (comparing a deliberate intentional acts statute and a workers compensation retaliatory discharge claim; an "action for retaliatory discharge is integrally related to the just and smooth operation of the workers' compensation system; it ensures that those seeking compensation benefits are not scared out of making claims;" thus, "the significant differences between a retaliatory discharge claim and [this] claim render the decisions remanding retaliatory discharge actions inapplicable here"). Likewise, courts adopting the *Spearman*

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[3] It should also be noted that a strong dissent was issued in *Spearman*, which opinion is consistent with Respondents' interpretation of *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), and *Jones v. Roadway Express, Inc.* stated herein.

rationale recognize that its holding is applicable only in states where workers compensation retaliatory discharge claims are treated as common law, independent tort claims, unlike Texas. *Hanna v. Fleetguard, Inc.*, 900 F. Supp. 1110, 1118, 1122-23 (N.D. Iowa 1995).

II. The Fifth Circuit Has Not Established An Impermissible Per Se Rule That Worker's Compensation Discrimination Claims Can Never Be Preempted By § 301 of the Labor Management Relations Act (LMRA).

A. This Case Requires No Interpretation of The CBA, Nor Was It Invoked

Petitioner predicates its second basis for review upon the proposition that the claims brought by Respondents in this case require interpretation of the Collective Bargaining Agreement (CBA). See Petitioner's Brief, p. 16 ("*Trevino* also conflicts with decisions . . . which have held that claims of workers' compensation discrimination are preempted by § 301 *when they allege a breach or require interpretation of a CBA*"); p. 21 ("As demonstrated above, [these] Circuits have held that workers' compensation retaliation claims are preempted if adjudicating the claims *would require interpretation of a CBA* or if the Plaintiffs claim that a *provision contained in the CBA* discriminates against employees who have pursued workers' compensation claims."); p. 22 ("In *Trevino*, the Fifth Circuit determined that the Plaintiffs' claims that they were discriminatorily terminated because they pursued their rights under the workers' compensation laws were not

preempted *even though they involve the interpretation of detailed LOA provisions in the CBA*. This Court has not considered whether the workers' compensation discrimination claim of an employee *who was terminated in accordance with the LOA provisions in a CBA* is preempted by § 301").

This conclusion is erroneous. Petitioner misstates and misconstrues the holding of the Court of Appeals. As the Fifth Circuit recognized, and as Respondents have maintained throughout, Respondents' claims arise independent of the provisions of the CBA. As this honorable Court recognized in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S. Ct. 1877, 1885, 100 L. Ed. 2d 410, 423 (1988), state law is not always preempted when a workers' compensation claim is brought, but in fact is preempted only where the claim asserted "requires the interpretation of a collective-bargaining agreement". Where, as here, the right to be free from retaliatory discharge for pursuing workers' compensation exists independent of the CBA, as it did in *Lingle*, such right does not depend upon or originate in the CBA. C.f. *Decoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) ("if the Plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement"). Instead, the right would exist even if there were no CBA. In other words, this right exists to each employee individually, and does not arise solely because Respondents are members of a collective organization.

In fact, Respondents never invoked any provision of the CBA in their Petition, and neither was the CBA cited at any point in support of the Respondents' claims.

Instead, it is Petitioner who invokes the provisions of the CBA, not Respondents, and the provisions of the CBA are cited by Petitioner not to establish the basis of Respondents' recovery, but are instead invoked *in defense of* and *in purported justification of* Petitioner's actions.

B. Fifth Circuit Has Remained True to the Holding in *Lingle*

Notwithstanding opposing counsel's arguments to the contrary, the Fifth Circuit has maintained and enforced, not ignored, the holdings and distinctions recognized in *Lingle*. In *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991), *rehearing den'd*, 936 F.2d 789 (5th Cir. 1991), the Fifth Circuit cited this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S. Ct. 1877, 1885, 100 L. Ed. 2d 410, 423 (1988), holding that § 301 preempts an application of state law only if such application requires the interpretation of a collective-bargaining agreement. Noted the Fifth Circuit, "Congress did not intend that section 301 should preempt 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Id.* at 1089. The *Jones* Court even extended this rule to circumstances beyond those in the present case, holding that, "A plaintiff's state law claims will not be preempted, even when they are 'intertwined' with a CBA, so long as they are not 'inextricably intertwined' with it. [Citations omitted] Indeed, either party may use a CBA to support the credibility of its claims." *Id.* at 1089.

In deciding that a claim under art. 8307c (now § 451.001, et seq. of the Labor Code) is not preempted, the *Jones* court stated as follows:

> As in *Lingle*, the basic issue in this case is whether a retaliatory discharge occurred. Resolution of this issue does not require an interpretation of the CBA. The trial court has to ascertain if retaliation was among the reasons for which Roadway dismissed Jones. [Citation omitted]. Roadway may have had other reasons, even reasons which the CBA justified, for dismissing Jones. But if retaliation was a factor, then for the purposes of Jones' article 8307c claim, an interpretation of the CBA is not inextricably intertwined with the state-law claim. As this court has earlier noted, however, [citation omitted], we do not require that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims.
>
> Furthermore, *the right to be free from retaliatory discharge for pursuing workers' compensation exists* for Jones, as it did for the employee in *Lingle, independently of the CBA*. The right originates in the statute which Texas has enacted to protect employees seeking compensation for work-related injuries. It does not depend upon any right or duty originating in the CBA. Jones' right would exist even were there no CBA. The right that Jones claims accrues to employees "as individual workers, not as members of a collective organization."

Id. at 1090.

In this case, as in *Jones*, Respondents' claims are not dependant upon an interpretation of the CBA; "[r]ather,

Plaintiff's right to be free from retaliation is grounded in Texas statute, and not the CBA." *Garcia v. Rainbo Baking Co. of Houston*, 18 F. Supp. 2d 683 (S.D. Tex. 1997). Respondents established a prima facie case of retaliatory discharge by showing that they were discharged after filing their workers compensation claims. C.f. *Decoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) ("if the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement"). The CBA appears nowhere on the face of Respondents' complaint, nor is an action under the CBA implied or stated. Instead, it was Petitioner who invoked the CBA in defense of its actions.[4]

Thus, there is no escaping the fact that, were the CBA completely eliminated from this case, Respondents would still have a basis for asserting their cause of action. Thus, Petitioner's strawman argument that the Fifth Circuit has somehow ignored or overturned precedent requiring pre-emption where interpretation of a CBA is involved is inapplicable to this case, where such interpretation is *not* involved.

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[4] Respondents admit that they *responded* to the defense raised by Petitioner under the CBA, i.e. the leave of absence provision, but this does not transform this into a preempted cause of action. As noted, Courts "do not require that the CBA be irrelevant to the dispute" in order to require remand. *Jones v. Roadway Express, supra* at p. 1090.

C. Petitioner's Strawman Argument Rebutted

Petitioner is likewise erroneous in alleging that "*Trevino*, in affect, holds that a workers' compensation retaliation claim can never be preempted," Petitioner's Brief, p. 13, and that "[t]he Fifth Circuit failed to discuss any of the facts set forth [in Petitioner's Brief] surrounding Plaintiffs' discharges or the CBA provisions that underlie their workers' compensation discrimination claims. Rather, the Court simply set out a bright line rule that workers' compensation discrimination claims, by their very nature, can never be preempted by § 301 of the LMRA." Petitioner's Brief, p. 6. Petitioner is in error. First, the Fifth Circuit spent a significant amount of time presenting and discussing the underlying claims and its analysis of same before concluding that the Respondents' claims were independent of, and not intertwined with, interpretation of the CBA. *See Trevino v. Ramos*, 197 F.3d 777, 778-781 (5th Cir. 1999). Second, the Fifth Circuit's opinion indicates that it was not precluding the possibility that, in other factual circumstances, a contrary result might be reached. In fact, given different circumstances, the Fifth Circuit *has* found preemption. *See, e.g., Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir.), *cert. den'd*, 510 U.S. 822 (1993), wherein the plaintiff was claiming that application of a provision in the CBA discriminated against him in violation of § 451, and *Thomas v. LTV Corp.*, 39 F.3d 611, 620 (5th Cir. 1994), in which the plaintiff "repeatedly testified that the basis for his wrongful discharge claim was the interpretation and application of the [Attendance Probation Agreement]." *See also Jones v. Roadway Express, Inc.*, 936 F.2d 789 (5th Cir. 1991), where

the Court distinguished the claims in *Thomas* and *Medrano* as "arising under" the CBA, holding:

> In *Thomas* and *Medrano*, the plaintiffs relied solely on the CBA to support their retaliatory discharge claims. *See Thomas*, 39 F.3d at 621; *Medrano*, 985 F.2d at 233-34. In the case at bar, the Plaintiff does not rely on the CBA in his complaint, and his deposition testimony does not explicitly indicate that a provision of the CBA is the sole basis of his retaliatory discharge claim.

In effect, Petitioner is asking this court to overturn the intent of Congress because Petitioner finds it to be unreasonable. Petitioner complains that "by concluding the workers' compensation discrimination claim 'arises under' a state's workers' compensation laws within the meaning of § 1445(c), *Trevino* effectively deprives a federal district court of removal jurisdiction over such claims." However, this appears to have been Congress' express, and exact, purpose. The purpose of 28 U.S.C. § 1445(c) was and remains to stop the plethora of cases being removed to federal court. The narrow interpretation of this provision posited by Petitioner is contrary to this stated purpose. For this reason, the Fifth Circuit stated that Congress did not intend that § 301 should preempt " 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Jones v. Roadway Express, Inc.*, 931 F.2d at 1089.

D. Petitioner's Authorities Distinguished

The Supreme Court decisions cited by Petitioner are not in conflict with the Fifth Circuit's decision in this

case. Petitioner's citation to *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucus Flour Co.*, 369 U.S. 95, 103 (1962), cited for the proposition that "the court held that a state court suit *alleging a CBA violation* must be brought under § 301 and must be resolved by reference to federal law" is inapposite to this case, wherein Respondents are not alleging a violation of the CBA, and instead allege a right independent of the CBA, i.e. the statutory right not to be discriminated or retaliated against for having filed a workers' compensation claim.

Likewise, the holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985), cited for the proposition that "the Court extended the preemptive effect of § 301 beyond suits alleging contract violations *to suits involving the interpretation of a CBA*," Petitioner's Brief at pp. 13-14, is inapposite to this case where, again, Respondents' claims do not involve interpretation of a CBA, but assert rights independent of a CBA.

Finally, the holding in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), obviously is not in conflict with the holding in this case. Although Petitioner argues that the *Lingle* Court "reaffirmed the broad and preclusive effect of § 301 preemption when a state law claim requires interpretation of a term in a CBA," Brief at p. 15, and further argues that preemption occurs if "resolution of a state-law claim depends upon the meaning of a Collective-Bargaining Agreement," Petitioner's Brief at p. 16, neither point is applicable to this case, wherein recognition of Respondents' rights does not depend upon the meaning of the Collective Bargaining Agreement.

Petitioner is likewise incorrect in asserting that the Fifth Circuit's decision in this case conflicts with the decisions of other federal circuit courts. For example, in the First Circuit cases of *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990); *Smith v. WGBH Educational Foundation, Inc.*, 7 F.3d 218, 1993 WL 375816 (1st Cir. Sept. 27, 1993); and *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir.), *cert. den'd*, 522 U.S. 818 (1997), all relied on by Petitioner and all involving Massachusetts law, retaliatory discharge claims were, by the express terms of the Massachusetts statute, subject to the terms of any CBA. *Magerer*, at p. 529-30. Additionally, the First Circuit held in these cases that the management rights clause in the CBA provided standards that governed the underlying retaliatory discharge claim, *Magerer* at 530; *Martin*, at 43, and further found that the CBA and workers' compensation law in Massachusetts were or may be in conflict. *Smith*, at *1; *Martin*, 105 F.3d at 44. In other words, as Petitioner admits, "because Plaintiff's claim *required interpretation of the CBA*, the court held that it was preempted," Petitioner's Brief, at p. 18, and "because the *management rights clause was arguably inconsistent with the statute*, the Court would have to construe the CBA to decide the claims." Petitioner's Brief, at p. 18. Such interpretation is not required in this case, wherein Respondents' rights exist independent of the CBA and are not in conflict with the CBA.[5]

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[5] Likewise, the CBA in this case did not contain a "management rights" clause and the statute does not incorporate same, both of which were true in *Magarer, Martin* and *Smith*.

The same is also true of the Court's holding in *Roberts v. Autoalliance Int'l, Inc.*, 996 F.2d 1216 (table), 1993 WL 210717 (6th Cir. June 15, 1993). In that case, the Sixth Circuit held that "this provision made the plaintiff's claim dependent on the CBA because *the district court would have to interpret the CBA* to reach the Plaintiff's claim." Petitioner's Brief, at p. 19, quoting *Roberts v. Autoalliance Int'l, Inc.*, at *5. No such interpretation is required in this case, where, as the Fifth Circuit noted, "The right originates in the statute which Texas has enacted. . . . It does not depend on any right or duty originating in the CBA. [Plaintiff's] right would exist even were there no CBA." *Jones v. Roadway Express, supra* at 1090.

Illuminating is the Court's discussion in *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995). Although Petitioner is correct in noting that the *Humphrey* Court declined to adopt a rule that a claim which arises under a state's workers' compensation law is per se nonremovable under § 1445(c), this holding is neither novel nor in conflict with Fifth Circuit precedent, which also recognizes that claims unlike those involved in this case (such as claims where the plaintiff is invoking the CBA, e.g., *Medrano v. Excel Corp., supra; Thomas v. LTV Corp., supra,* or where the Plaintiff's claim originated at common law, e.g. *Patin v. Allied Signal, Inc., supra* at 787), may be removable. More specifically, when addressing the claims which *are* similar to those in this case, the *Humphrey* Court held as follows:

> Under the plain meaning of the statute, where a state legislature enacts a provision within its workers' compensation laws and creates a specific right of action, a civil action brought to

> enforce that right of action is, by definition, a civil action arising under the workers' compensation laws of that state and therefore § 1445(c) applies; under such circumstances, the action would be non-removable, subject only to the complete preemption doctrine.

Humphrey, supra. Thus, quite in contrast to the proposition posited by Petitioner, *Humphrey v. Sequentia, Inc.* supports Respondents' position.

Finally, in the case cited from the Ninth Circuit, *Sanders v. Hughes Aircraft Co.*, 26 F.3d 132 (table), 1994 WL 227971 (9th Cir. May 27, 1994), "the court noted that the plaintiff's complaint indicated that his retaliatory termination claim *was in part based on alleged violations of the CBA*. [citations omitted]. The Court held that *to the extent the plaintiff's complaint indicated that his claim was partly based on alleged violations of the CBA,* his claim was preempted by § 301." Petitioner's Brief, at p. 21, quoting *Sanders v. Hughes Aircraft Co., Id.* at *2. Petitioner's own analysis of the holding in that case demonstrates that same is inapposite to the present holding.

E. Regardless, Certiorari Review Inappropriate

The cases cited by Petitioner are inapposite to the Fifth Circuit's holding in this case. However, even if these cases did stand for the propositions cited by Petitioner, they would still not merit review by this Honorable Court. The principles discussed have not yet reached the level of "maturity," ripeness or conflict warranting Supreme Court review.

CONCLUSION

Certiorari should not be granted for several reasons. First, the conflict between the Circuits which is alleged is illusory; the cases cited can be reconciled, particularly when the Court considers whether the claims asserted arose at common law and are independent of the workers' compensation law, or arose by statute and are integral to the workers' compensation scheme. Second, Petitioner misreads the Fifth Circuit's opinion, which renders the nature of the legal issues presented by Petitioner for review inaccurate and/or improper. *Inter alia*, the Fifth Circuit has not established a per se rule that workers' compensation discrimination and/or retaliation claims can never be preempted by § 301 of the LMRA. Third, for the reasons stated above, as well as the reasons stated by the Fifth Circuit Court of Appeals, the right result was reached below. Fourth, even if this Court feels there is a conflict in the Circuit opinions and that the other reasons posited by Respondents for denying certiorari are invalid, the issue is not ripe for review because the Circuit courts are still developing the law and distinctions important to a cohesive and comprehensive policy in this area.

PRAYER

Respondents pray that, for the reasons stated and/or in the interests of justice, the Petition for Writ of Certiorari sought by Levi Strauss & Co. be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ, AND GLORIA GUAJARDO	* * * * *	CIVIL ACTION NO. M-95-CV-262 JURY
VS.	* *	
MIKE RAMOS AND LEVI STRAUSS & CO.	* * *	

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME, AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ, AND GLORIA GUAJARDO, hereinafter referred to as plaintiffs, complaining of MIKE RAMOS AND LEVI STRAUSS & CO., hereinafter called by name or collectively as defendants, and for such cause of action, would respectfully show unto the Court and jury as follows:

A.

VENUE AND JURISDICTION

1. Plaintiffs, AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO, are residents of Hidalgo County, Texas.

2. Defendant, MIKE RAMOS, is an individual residing in Hidalgo County who has been served with citation

and has appeared herein. No service is necessary at this time.

3. Defendant, LEVI STRAUSS & CO., is a foreign corporation formed under the laws of another state, that has been served with process and has appeared herein. No service is necessary at this time.

4. Venue is proper in Hidalgo County, Texas in that the incidents the basis of this cause of action occurred in Hidalgo County and plaintiff further resides in the county.

B.

FACTUAL ALLEGATIONS

5. *Agustina Trevino:* Plaintiff Agustina Trevino accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about February 9, 1994, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Agustina Trevino thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about March, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Agustina Trevino asserts that the true reason she was fired was because she in good faith instituted a claim and took

other protected steps under the Workers Compensation Act.

6. *Herminia Herrera*: Plaintiff Herminia Herrera accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about May 05, 1994, while in the course of her employment with Levi Strauss & Co., Plaintiff Herminia Herrera received an on the job injury. Plaintiff thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about January 11, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Herminia Herrera asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

7. *Beatriz Olivarez*: Plaintiff Beatriz Olivarez accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about May 11, 1995, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Beatriz Olivarez thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's

workmen's compensation carrier to pay for plaintiff's medical expenses. On or about January 11, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Beatriz Olivarez asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

8. *Gloria Guajardo*: Plaintiff Gloria Guajardo accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about June, 1993, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Gloria Guajardo thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about June 06, 1994, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Gloria Guajardo asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

D.

WRONGFUL DISCHARGE (8307)

9. This lawsuit has been filed to remedy the wrong done to plaintiffs which arose from their exercise of their rights under the Workers Compensation Act and Article 8307c (Now Tex. Labor Code, Section 451.001). For injuries they received, in the course and scope of their employment, plaintiffs did in good faith take steps towards instituting a proceeding as well as other protected steps under the Worker's Compensation Act. Having been discriminated against, plaintiffs seek full redress for all the damages they have incurred. Plaintiffs allege that there was no legitimate business justification for Plaintiff's termination in that Plaintiffs had always performed an excellent job for the Defendant and that there was work available that the Plaintiffs could perform. Plaintiffs assert that the true reason they were fired was because they in good faith instituted a proceeding and filed a claim under the Texas Worker's Compensation Act. Plaintiffs further assert and intend to prove that the treatment they received was a pattern and practice engaged in by the Defendant corporation towards the Plaintiffs and others similarly situated. This unwritten plan or scheme was to discriminate and/or terminate against employees for taking protected steps under the Worker's Compensation Act.

E.

DAMAGES

10. *Actual Damages:* As a result of the incidents described above, that made the basis of this suit, plaintiffs have incurred damages in the following respects:

a. *Lost Earnings*: At the time of the incident complained of, plaintiffs were gainfully employed. As a proximate result of the wrongful acts of the defendant, plaintiffs were unable to attend to their occupations and thereby suffered loss of income for which they hereby sue. In all reasonable probability their loss of income will continue long into the future, if not for the balance of plaintiffs' natural life, all to their damage for which they hereby sue.

b. *Past and Future Mental Anguish*: As a result of the incidents described above, made the basis of this suit, plaintiffs have suffered mental pain and anguish. In all reasonable probability, plaintiffs will continue to suffer such mental pain and anguish for a long time into the future, if not for the balance of their natural lives.

12. [sic] *Exemplary Damages*: The conduct of the defendants, set out above, was carried out and constituted such an entire want of care as to constitute a conscious indifference to the rights or welfare of the plaintiffs. Plaintiffs are entitled to recover exemplary damages to deter such cruel and undignified procedures by the defendant in the future. Accordingly, plaintiffs request that exemplary damages be awarded against the defendants.

F.

PRAYER

WHEREFORE PREMISES CONSIDERED, plaintiffs pray that the Honorable Court grant the following:

a). Judgment against Defendants, jointly and severally, for Plaintiffs' damages;

b). Punitive Damages;

c). Prejudgment interest as allowed by law;

d). Interest on said judgment at the legal rate from date of judgment;

e). For costs of suit herein;

f). Such other relief as the Court deems proper.

Respectfully submitted,

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